## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

STACEY ERVIN,1732730,	)	
Plaintiff,	)	
v.	)	No. 3:13-CV-009-L
	)	
DALLAS COUNTY DISTRICT ATTORNEY'S	)	
OFFICE, ET AL.,	)	
Defendants.	)	

# FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b) and an order of the District Court, this case has been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge follow:

## I. <u>BACKGROUND</u>

Plaintiff filed this complaint pursuant to 42 U.S.C. § 1983. He is proceeding *pro se* and the Court has granted him leave to proceed *in forma pauperis*. Defendants are the Dallas County District Attorney's Office and the Southwestern Institute of Forensic Sciences ("SWIFS"). No process has issued pending judicial screening.

Plaintiff was convicted of sexual assault of child, cause number F97-77030-I, in Dallas County, Texas. He states that he filed a motion for DNA testing in 2003 or 2004, but he never received a response. He states that in December, 2010, Defendants agreed to conduct DNA testing. He alleges that in July 2012, Defendants informed him they were not able to locate the DNA evidence, and that the last record they had of the evidence was from 2002.

Plaintiff states that SWIFS's failure to train and supervise its employees to protect the DNA evidence violated his due process rights. He seeks money damages against Defendants.

#### II. SCREENING

A district court may summarily dismiss a complaint filed *in forma pauperis* if it concludes the action is: (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). To state a claim upon which relief may be granted, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face[,] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and must plead those facts with enough specificity "to raise a right to relief above the speculative level . . . ." *Id.* at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 162, 129 S.Ct. 1937, 1949 (2009). While a complaint need not contain detailed factual allegations, the plaintiff must allege more than labels and conclusions. *Twombly*, 550 U.S. at 555.

### III. DISCUSSION

The Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), holds that a prisoner cannot bring a § 1983 action challenging his conviction or confinement unless and until the reason for his continued detention has been reversed on direct appeal, expunged by executive order, or otherwise declared invalid by a state tribunal or federal court. *Heck* also bars damage claims, which, if successful, would necessarily imply the invalidity of a conviction or pending charge. *Hamilton v. Lyons*, 74 F.3d 99, 103 (5<sup>th</sup> Cir. 1996).

The Fifth Circuit has determined that a § 1983 complaint challenging the loss or destruction of DNA evidence is barred by *Heck*. In *Penley v. Collin County, Texas*, 446 F.3d 572, 573 (5<sup>th</sup> Cir.2006) (per curiam), the Court stated: "To the extent that the district court were

to award [plaintiff] damages on his claim regarding the destruction of evidence and the loss of the opportunity for DNA testing, the validity of his conviction would be implicitly questioned."

Plaintiff has failed to show that his conviction has been reversed or otherwise declared invalid. Hence, no § 1983 cause of action has yet accrued and these claims should be dismissed with prejudice until the *Heck* conditions are met. *See Johnson v. McElveen*, 101 F.3d 423, 424 (5<sup>th</sup> Cir. 1996) (stating dismissal should be with prejudice until *Heck* conditions are met).

#### RECOMMENDATION

The Court recommends that Plaintiff's complaint be dismissed with prejudice until the *Heck* conditions are met.

Signed this 9<sup>TH</sup> day of May, 2013.

PAUL D. STICKNEY

UNITED STATES MAGISTRĂTE JUDGE

# INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).